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Guidelines for a better implementation of the existing recommendation
concerning mediation in penal matters

<p style="text-align: center;">GUIDELINES FOR A BETTER IMPLEMENTATION OF THE EXISTING RECOMMENDATION CONCERNING MEDIATION IN PENAL MATTERS</p>

Introduction

1. At the Third Summit of the Council of Europe (Warsaw, May 2005), the Heads of State and Government undertook to make “full use of the Council of Europe’s standard-setting potential” and “promote implementation and further development of the Organisation’s legal instruments and mechanisms of legal co-operation”. They also decided “to help member states to deliver justice fairly and rapidly and to develop alternative means for the settlement of disputes”.

2. In the light of these decisions, the CEPEJ, one of whose aims in its Statute is “to enable a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice”, has included among its priorities a new activity directed towards facilitating effective implementation of Council of Europe instruments and standards regarding alternative dispute settlement.

3. The Working Group on Mediation (CEPEJ-GT-MED)¹ was therefore set up to gauge the impact in member states of the relevant recommendations of the Committee of Ministers, namely:

- Recommendation Rec(98)1 on family mediation,
- Recommendation Rec(2002)10 on mediation in civil matters,
- Recommendation Rec(99)19 concerning mediation in penal matters,
- Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties,

and to recommend specific measures for facilitating their effective implementation, thus improving implementation of the mediation principles contained in these recommendations.

4. This document concerns Recommendation Rec(99)19 concerning mediation in penal matters. The three other Recommendations, which concern family mediation, mediation in civil matters and alternatives to litigation between administrative authorities and private parties, require a specific approach and are examined in separate documents.

5. At the first meeting of the Working Group (Strasbourg, 8-10 March 2006), a questionnaire was drawn up to determine member states’ awareness of the above Recommendations and the development of mediation in their countries in accordance with the principles contained therein. The questionnaires were sent to 16 representative states.

6. 52 replies were received to the questionnaire from member states and from practitioners and a report was drawn up by Mr Julien LHUILLIER (France), scientific expert, summarising those responses. However, limited information was supplied on mediation in penal matters. Since the adoption of the Recommendation, the concept and scope of mediation in penal matters has developed, and a broader concept of “restorative justice” has emerged, including “victim-offender mediation”². Therefore, it is suggested that further work

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² See also UN Basic principles on the use of Restorative justice Programmes in Criminal Matters ECOSOC Res 2000/14 and Res 2002/12. The term “offender” which is, for practical reasons, used

should be undertaken on updating the Recommendation. Before doing so, it would be necessary to have a fuller evaluation of the impact of restorative justice in member states based on up-to-date and comparable data.

7. As might be expected, there are considerable differences between member states in the way that victim-offender mediation has advanced, particularly because of the following obstacles:

- lack of awareness of restorative justice and mediation,
- lack of availability of victim-offender mediation before and after conviction,
- power to refer parties to mediation limited only to a single criminal justice institution,
- relatively high cost of mediation,
- lack of specialized training and disparities in qualifications of mediators.

8. In the light of these obstacles and in view of the fact that restorative justice processes may serve as an alternative to conventional justice, and as a tool for conflict management, but also in view of its potential to repair harm and to reduce reoffending, the Working Group has drawn up the following non binding guidelines to help member states to implement the Recommendation concerning mediation in penal matters.

1. AVAILABILITY

9. To expand equal availability of mediation services, measures should be taken to promote and set up workable mediation schemes across as wide a geographical area as possible, at all stages of the criminal justice procedure, including the execution of sanctions.

1.1 Support of mediation projects by member states

10. Member states should recognise and promote existing as well as new workable mediation schemes by financial and other forms of support. Where successful mediation programmes have been established, member states are encouraged to expand their availability by information, training and supervision.

1.2. Role of the judges, prosecutors and other criminal justice authorities

11. Judges, prosecutors and other criminal justice authorities have an important role in the development of mediation. They should be able to give information, arrange information sessions on mediation and, where applicable, invite victims and/or offenders to use mediation and/or refer the case to mediation. Member states are encouraged to establish and/or improve co-operation between criminal justice authorities and mediation services to reach victims and offenders more effectively.

1.3. Role of social authorities and non governmental organisations

12. Member states are encouraged to recognise social authorities, victims support organisations and other organisations engaged in the criminal justice system, since they have an important role in promoting restorative justice and mediation. Where applicable, such bodies may invite victims and/or offenders to use mediation. They may for example have a role in conducting mediation, in offering different forms of restorative justice as well as in supporting the parties.

1.4. Role of lawyers

throughout the recommendation and these guidelines would also cover the alleged offender, for example, the accused or any person charged with a criminal offence.

13. The codes of conduct for lawyers should include an obligation or a recommendation for lawyers to take steps to provide relevant information and, where appropriate, suggest the use of victim-offender mediation to parties and plead for referral to mediation by the competent authorities.

1.5. Quality of mediation schemes

14. It is essential for judges, prosecutors and other criminal justice authorities when referring parties to mediation, for lawyers when advising clients, and for the general public confidence in the mediation process that the quality of mediation is assured.

15. It is important that member states continually monitor their mediation schemes and on-going pilot projects and arrange for their external and independent evaluation. Certain common criteria, including both qualitative and quantitative evaluation aspects, should be developed to enable the quality of mediation schemes to be compared. Legislators and/or criminal justice authorities of member states are encouraged to identify possible consequences of mediation and mediated agreements on criminal procedures.

16. In view of the imbalance of power between the victim and the offender following a crime, member states should be aware that the needs of the victim require special consideration before, during and after the mediation. For this reason, member states are recommended to carry out further research and developments in this matter.

1.6. Confidentiality

17. The duty of confidentiality should be binding for the mediator at all stages of the mediation process and after its termination. Whenever this duty is subject to exceptions³, these exceptions should be clearly defined by legislation.

18. Member States should provide for legal guarantees of confidentiality in mediation. The breach of the confidentiality duty by the mediator should be considered as a serious disciplinary fault and be sanctioned appropriately.

1.7. Mediators' qualifications

19. Member states and/or mediation stakeholders should provide adequate training programmes for mediators and, taking into account the disparities in training programmes, set up common standards concerning the training.

20. As a minimum, the following items should be covered in mediation training:

- principles and aims of mediation,
- attitude and ethics of the mediator,
- phases of the mediation process,
- basic knowledge of criminal justice system
- the relationship between criminal justice and mediation,
- indication, structure and course of mediation,
- legal framework of mediation,
- skills and techniques of communication and of work with victims, offenders and others engaged in the mediation process, including basic knowledge on reactions of victims and offenders,
- skills and techniques of mediation,
- adequate amount of role plays and other practical exercises,

³ See in particular Recommendation Rec(99)19 concerning mediation in penal matters, paragraph 30.

- specialist skills for mediation in cases of serious offences and offences involving minors,
- various methods of restorative justice,
- assessment of knowledge and competence of the trainee.

21. This training should be followed by supervision, mentoring and continuing professional development.

22. Member states should recognise the importance of establishing common criteria to permit the accreditation of mediators and/or institutions which offer mediation services and/or who train mediators. Because of the increased mobility throughout Europe, measures should be taken to establish common international criteria for accreditation as, for example, a certificate of European mediator, etc.

23. As certain member states encounter problems where the quality of training of mediators is concerned, national training institutions are recommended to establish links and/or to establish a continuous training programme for mediators and for mediation trainers (for example, a European training centre). This could be facilitated by the Council of Europe in co-operation with the European Union.

1.8 Participation and protection of minors

24. Member states should recognise the importance of supporting and protecting minors during their participation in the mediation process by the establishment of adequate safeguards and procedural guarantees.

25. Member states should work together to examine, evaluate, and identify good practices in order to establish specific guidelines to the participation of minors in mediation in penal matters. This could be facilitated by the Council of Europe in co-operation with the European Union.

26. These specific guidelines should include:

- a. the relevance of the child's age or mental maturity and its consequences for the involvement of the minor in the mediation procedure;
- b. the role of parents, in particular in those situations where parents may oppose participation in mediation;
- c. the involvement of social workers, psychologists and/or legal guardians in mediation when minors are present.

1.9. Codes of conduct

27. Member states should take measures to ensure the uniformity in the concepts, scope and guarantees of the main principles of mediation such as confidentiality and others within their countries, by legislative measures and/or by developing codes of conduct for mediators.

28. Having in mind that the European Code of Conduct for Mediators in civil and commercial mediation is gaining general recognition by various mediation stakeholders throughout Europe, it is recommended that a special Code of Conduct shall be elaborated with respect to the particularities of mediation in penal matters.

1.10. Breaches of codes of conduct

29. Where mediators breach a code of conduct, member states and mediation stakeholders should have in place appropriate complaints and disciplinary procedures.

1.11. International mediation

30. Discharges based on mediated agreements should have the same status as judgments or other judicial decisions, if they are taken by official judicial staff, e.g. member of the office of the public prosecutor or judge. Such a decision will preclude prosecution in respect of the same facts in another member state (ne bis in idem).

2. ACCESSIBILITY

2.1. The rights of victims and offenders

31. In order to enable victims and offenders to take part in mediation, members States should take all necessary steps to ensure that their rights are protected and that they are fully aware of their rights. Mediation requires the free and informed consent of both victims and offenders, and should never be used if there is a risk that mediation may disadvantage one of the parties. Due consideration should be given not only to the potential benefits but also to the potential risks of mediation for both parties and in particular for the victim⁴.

32. Special effort should therefore be made to ensure that information about victim-offender mediation is clear, complete and timely.

This information should contain:

- the process of the mediation itself;
- the rights and obligations of users;
- the legal effects of mediation.

33. The parties in mediation should, in particular, be fully informed of the possible consequences of the mediation procedure on the judicial decision making procedure. including discontinuation of the criminal procedure, suspension or mitigation of the sanction imposed on the alleged offender. Also, in cases where victims are particularly vulnerable, they should be made aware of the possibility of conducting a mediation without face-to-face contact with the offender.

2.2. Cost of the mediation for the users

34. In order to make mediation accessible, member states should ensure direct financial support to mediation services via legal aid and/or other means. Exceptionally, in those member states where the offender has to finance partly his/her participation in mediation, member states should ensure that his/her contribution remains proportionate to his/her income. A costly mediation procedure not covered by legal aid might be an obstacle to mediation.

2.3. Suspension of limitation terms

35. In order to make mediation accessible, its use should not be prevented by the risk of expiry of limitation terms. In order to rectify this problem, member states are encouraged to consider implementing provisions for the suspension of limitation terms.

3. AWARENESS

36. It appears from the questionnaire responses that lack of awareness about restorative justice among the judiciary, prosecutors and other criminal justice authorities, victim support

⁴ See Recommendation Rec(2006)8 on assistance to crime victims, item 13.

organisations, legal professionals, victims and offenders and the general public is one of the main obstacles to the development of mediation.

37. In order for the Recommendation on mediation in penal matters to be accessible to policy makers, academics, mediation stakeholders and mediators, it is vital that it is translated and disseminated in the languages of all member states.

38. It is recommended that CEPEJ creates a special page on mediation in its website. It could include translated text of the Recommendation, its explanatory memorandum and other relevant texts of the Council of Europe concerning mediation, assessment of the impact in countries of the Recommendation on mediation in penal matters. This special page could also include information on the monitoring and evaluation of mediation schemes and mediation pilot projects, list of mediation providers in member states, useful website links, etc.

3.1. Awareness of the general public

39. Member states, NGO's and other mediation stakeholders should take appropriate measures to raise awareness of the benefits of the mediation among the general public.

40. Such measures may include:

- Articles/information in the media,
- dissemination of information on mediation via leaflets/booklets, internet, posters,
- mediation telephone helpline,
- information and advice centres,
- focused awareness programmes such as "mediation weeks",
- seminars and conferences,
- open days on mediation at courts and institutions which provide mediation services

41. Member states, universities, other academic institutions and mediation stakeholders should support and promote scientific research in the field of mediation and restorative justice.

42. Mediation and other forms of restorative justice should be included in schools national curricula.

3.2. Awareness of the victims and offenders

43. Members of the judiciary, prosecutors, the police, criminal justice authorities, lawyers and other legal professionals, social workers, victims support organisations as well as other bodies involved in restorative justice should provide early information and advice on mediation to the victims and offenders, accentuating the potential benefits and risks to both.

3.3. Awareness of the police

44. Since the police intervene during the early stages of a case, and are therefore the first to be in contact with the victims and offenders, their training should include an understanding of restorative justice. Specific consideration should be given to the matter of referring cases to mediation. This could be achieved by training including information on perpetrators and victims, as well as through the distribution of leaflets/brochures.

3.4. Awareness of the judiciary and prosecutors

45. An increasing number of member states have adopted legislative measures to allow judges and prosecutors, on an equal footing, to invite victims and/or offenders to use

mediation and/or refer the case to mediation. For this reason, these two bodies should be fully informed of the mediation procedure and conscious of its advantages and possible risks. This could be achieved via information sessions and initial and continuous training programmes.

46. It is important to foster both institutional and individual links between mediators and judges/prosecutors. This can be done in particular by conferences and seminars.

3.5. Awareness of the lawyers

47. Restorative justice and mediation should be included in the curricula of initial as well as continuous training programmes for lawyers.

48. Bar associations and lawyers associations should have lists of mediation programmes providers and disseminate them to lawyers.

49. Member States and Bar associations should take measures to create legal fee structures that do not discourage lawyers from advising clients to use mediation in settling disputes.

3.6. Awareness of social workers

50. Member states are encouraged to take measures to raise the awareness of social workers to restorative justice and mediation.